2. Nor did petitioners waive the jurisdictional error at issue here. See Br. in Opp. 17-18. After the district court denied petitioners' motion to compel arbitration, petitioners immediately appealed, and then advised the district court that they would not participate further pending resolution of the appeal. C.A. App. 1729, 1733. Following remand of the Section 16(a) appeal, petitioners likewise argued that, because the district court had lacked jurisdiction to conduct trial and enter orders pending resolution of the interlocutory appeal, all such orders and proceedings were "nullities." C.A. App. 2223-2224. Neither the trial court nor the court of appeals rested their decision on waiver, and the argument is without merit.[3]

Respondents' waiver argument also departs from the fundamental precept that, if a district court erroneously asserts jurisdiction, that error can be corrected on appeal following final judgment. *Van Cauwenberghe* v. *Biard*, 486 U.S. 517, 527 (1988). The absence of any legal authority to support that departure confirms its lack of merit.

3. Finally, respondents erroneously claim that the first question is not presented at all because a Section 16(a) appeal by a litigant who is not a party to the arbitration agreement is necessarily frivolous. Br. in Opp. 18-20. But, as just noted, both the court of appeals and the district court acknowledged that petitioners' interlocutory appeal raised issues that were not only non-frivolous, but difficult. See p. 4, *supra*. Indeed, one of the cases respondents themselves cite expressly holds that parties who were not signatories to an arbitration agreement had "a right to

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their first appearance before the district court, and maintained that the district court was without jurisdiction to conduct a trial from the moment that they appealed its denial of their motion to compel arbitration and its injunction against pending Swiss arbitrations.

[3] Respondents speculate that "the Uzans would not have attended trial in any event." Br. in Opp. 17. But such speculation is irrelevant to whether the district court had jurisdiction during the Section 16(a) appeal.

appeal under section 16" after their motion for a stay pending arbitration had been denied. *IDS Life Ins. Co.* v. *SunAmerica, Inc.*, 103 F.3d 524, 527 (7th Cir. 1996).

Bombardier makes clear, moreover, that petitioners' ultimate lack of success on the merits of their interlocutory appeal is irrelevant to the jurisdictional impact of the appeal. In that case, the D.C. Circuit held that a non-frivolous Section 16(a) appeal, even if unsuccessful, divests the district court of jurisdiction *Bombardier*, 2002 WL 31818924, at *1. Besides, this first question could reach this Court only because petitioners ultimately were unsuccessful on the arbitrability question. See Pet. 18-19. It is precisely for that reason that this case provides the ideal vehicle for resolving the first question presented. As the petition shows—and respondents nowhere dispute—that question is important, recurring, and warrants this Court's review.

II. This Case Offers An Ideal Vehicle For Resolving The Role Of Choice-of-Law Clauses In Arbitrability Disputes.

Respondents do not contest that the courts of appeals are split over whether a general choice-of-law clause evidences parties' intent to have specific rules decide questions of arbitrability. Pet. 21-25. Nor do they contest that the inconsistent rulings on this issue generate great uncertainty. Instead, respondents argue that this important conflict is not implicated by this international case.[4]

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[4] It is ironic that respondents stress the international character of this commercial dispute. Indeed, *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506 (1974), on which respondents now rely, holds that a U.S. citizen cannot avoid contractual obligations to arbitrate international commercial disputes by bringing non-contractual claims under U.S. law in a U.S. court. In this very case, respondents brought RICO and common-law fraud claims in the U.S. against Telsim's officers, directors and shareholders rather than Telsim itself for the purpose of avoiding arbitration obligations. As in *Scherk*, the United States is connected to this dispute only because MCC "is an American corporation" and "some—but by no means the greater part—of the pre-contract

But the evidentiary weight to be assigned to a general choice-of-law clause does not vary from domestic to international transactions. In both situations, use of forum law (the FAA) offers the most predictable and efficient way to determine and enforce parties' intentions regarding arbitration. For that reason, parties must *clearly* express an intent to incorporate arbitrability rules other than forum law (the FAA) into their agreement, and the addition of a common choice-of-law clause alone is not sufficient to demonstrate that intent.

A. Respondents contend that, because this case presents that choice-of-law issue from an international perspective, it does not reach the circuit split that, according to respondents, turns on questions of federalism and preemption. Br. in Opp. 21-24. But respondents themselves admit that Chapter 2 of the FAA, like Chapter 1, is designed to ensure the enforcement of agreements to arbitrate, Br. in Opp. at 22, and thus advances "the FAA's raison d'etre, which is to overcome rules (whether created by state legislatures *or by courts*) that make it *more difficult* to enforce arbitration agreements." *Roadway Package System, Inc.* v. *Kayser*, 257 F.3d 287, 296 (3d Cir. 2001) (first emphasis added). The undisputed conflict in the lower courts, therefore, is not over the preemptive force of the FAA, but rather over whether inclusion of a general choice-of-law provision is sufficient evidence that parties intended to opt out of the FAA's rules favoring arbitrability in favor of the rules of the forum identified in the general choice-of-law clause. See *Roadway Package*, 257 F.3d at 294 ("We decline to construe the choice-of-law clause in this case as evidencing a clear intent to incorporate Pennsylvania's standards for judicial review [into the parties'

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negotiations" occurred here. 417 U.S. at 517 n.11. It is precisely in international commercial disputes like this one that arbitration clauses (like those contained in the loan agreements giving rise to respondents' claims) must be respected.

agreement]."). That question does not depend on whether the choice-of-law provision selects state or foreign law.[5]

2. Respondents also err when they defend the court of appeals' reliance on Swiss law to decide petitioners' motion to compel arbitration. Although the court below suggested that "applying the parties' choice of law is the only way to ensure uniform application of arbitration clauses within the numerous countries that have signed the New York Convention," Pet. App. 19a, that approach has led to far from predictable results even here: Who could have predicted that a Finnish corporation (Nokia) would be able to obtain a multi-billion dollar judgment from a U.S. court against Turkish nationals for the value of loans to a Turkish company under agreements that called for the resolution of "all disputes" through arbitration in Switzerland? The appropriate and predictable result would have been for the district court to compel arbitration of respondents' claims, or to stay litigation pending the Swiss tribunal's determination of whether the claims were subject to arbitration. Applying the FAA accomplishes that goal without disrupting the parties' expectations regarding arbitration.[6]

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[5] Respondents do not identify a single case that supports using a choice-of-law clause differently in international cases than in domestic cases. In fact, even the Second Circuit has routinely looked to the FAA, not the law chosen by a general choice-of-law clause, to decide arbitrability questions in international cases. See, e.g., *Campaniello Imports, Ltd.* v. *Saporiti Italia S.p.A.*, 117 F.3d 655, 666-668 (2d Cir. 1997).

[6] Respondents' claim that petitioners "sought arbitration only under U.S. or Swiss equitable principles" Br. in Opp. 7, 24 n.13, is incorrect. In fact, the motion to compel arbitration relied on the FAA's prohibition against efforts to plead around arbitration agreements by adding claims against non-signatories. See C.A. App. 701. "In addition," petitioners argued that "signatories to an arbitration agreement can be compelled to arbitration by non-signatories based on a theory of estoppel." C.A. App. 702. The court of appeals thus did *not* find that petitioners' legal arguments under the FAA had been "waived." Pet. App. 16a.

3. Respondents do not seriously defend the court of appeals' application of the FAA to decide some arbitration issues, and Swiss law to determine others, as advancing the interest of predictability. To the extent forum law (the FAA) properly governs the power of the court of appeals to decide questions about the arbitrability of respondents' claims, Br. in Opp. 28, forum law (the FAA) likewise governs petitioners' motion to compel arbitration. Moreover, petitioners "told" the court of appeals (correctly) that "defenses to arbitrability based on Swiss law are for the arbitrators, and not for this [c]ourt, to decide," Pet. C.A. Supp. Br. 19 (July 14, 2004), and that "Swiss law vests the arbitral tribunal with authority to determine its own jurisdiction," *id.* at 24.

III. Respondents' Alternative Ground Is No Barrier To Review.

The court below rejected application of the "Fugitive Disentitlement Doctrine" in this case in a separate ruling, explaining that "a nonresident who appeals an adverse judgment is in a different position than the typical fugitive who leaves a jurisdiction for the sole purpose of evading a judgment," and that the jurisdictional issues presented by the appeals are not affected by the fact that petitioners have not returned to the United States following entry of judgment. Pet. App. 48a; see also *Degen* v. *United States*, 517 U.S. 820, 828-829 (1996) ("Th[e] respect [accorded a court's judgments] is eroded, not enhanced, by too free a recourse to rules foreclosing consideration of claims on the merits."). The doctrine is thus inapplicable in this case, and has no bearing on the Court's review of the important issues that have divided the courts of appeals and that are squarely presented by the petition.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition should be granted.

Respectfully submitted,

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